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an investigation under Chapter XIV of the Criminal Procedure Code. The charge, set out above, states that this statement before the head constable was made in the course of an inquiry in a case of arson of *The Empress* v. *Rambandhu Ghose and others*. A case of arson is certainly a cognizable case; but that Anadinath Bundopadhya was making an inquiry under Chapter XIV, when the statement in question was made, and that the case in which that inquiry was being made was a case of arson, is not at all clearly established by the evidence recorded in the case. All that the witnesses who speak upon that point say, is that an inquiry was being made in the case of *Buloram Roy* v. *Rambandhu Ghose* about the burning of a house. This evidence is not in our opinion sufficient to show that the inquiry was being made into a cognizable case, *viz*, arson. We are, therefore, of opinion that the verdict of the jury was right. We therefore acquit the accused of the charge framed against him and direct his release from custody.

H. T. H. *Acquittal upheld.*

## APPELLATE CIVIL.

*Before Mr. Justice Prinsep and Mr. Justice Ghose.*

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*January* 14.

GOUR SUNDAR LAHIRI (DEFENDANT) *v.* HEM CHUNDER CHOWDHURY (PLAINTIFF).

GOUR SUNDAR LAHIRI (DEFENDANT) *v.* HAFIZ MAHOMED ALI KHAN (PLAINTIFF).*

*Civil Procedure Code*, 1882, *s.* 244—*Representative of judgment-debtor—Purchaser at execution sale—Private Purchase—Limitation Act*, 1877, *Art.* 179—*Application not in accordance with law—Application for execution by Benamidar—Purchase* pendente lite.

The defendants Nos. 2, 3 and 4 were, together with one *M*, the owners of certain immoveable property, including two mehals, Olipore and Ekdhala, subject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending one *K D* took out execution of a money decree which he had obtained in 1871, against defendant No. 3, and put up for sale the mehal Olipore which was purchased by the father

* Appeals from Original Decrees, Nos. 103 and 104 of 1887, against the decrees of Baboo Hemango Chunder Rose, Subordinate Judge of Mymensingh, dated the 26th of February 1887.

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of the plaintiff *A*, who eventually obtained possession of it through the Court. The plaintiff *B* purchased privately the mehal Ekdhala from the mortgagors and from *M*, some time after the date of the decree on the mortgage. That decree was in course of execution when the mortgagee died and his estate came into the hands of the Administrator-General, who, on 13th August 1878, sold the decree to *G*, defendant No. 1. After this sale several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice to the defendants under s. 232 of the Civil Procedure Code, *G's* name was substituted as decree-holder, and execution was taken out against the mortgaged property including Olipore and Ekdhala. The plaintiffs each claimed the mehal they had respectively purchased, but their claims were disallowed.

In suits brought by the plaintiffs for a declaration of their right to hold the properties free of the mortgage, the Court found that *G* was only a *benamidar* so far as his purchase of the mortgage decree was concerned. *Held*, the plaintiff *A*, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors, the mortgagors, within the meaning of s. 244 of the Civil Procedure Code; but the case was different with respect to plaintiff *B*, who claimed by private purchase, and must be considered the representative of the judgment-debtors within the meaning of that section.

*Dinendronath Sannyal* v. *Raj Coomar Ghose* (1), *Anundmoyee Dossee* v. *Dhonendro Chunder Mookerjee* (2), and *Lalla Prabhulal* v. *Mylne* (3), referred to.

*Held*, also, that *G* being merely a *benamidar*, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code, were not applications made in accordance with law, within the terms of Art. 179 of the Limitation Act, 1877, so as to prevent the operation of the law of limitation. Execution of the mortgage decree was, therefore, barred.

*Abdul Kureem* v. *Chukhun* (4), *Denonath Chuckerbutty* v. *Lallit Coomar Gangapadhya* (5), and *Mis. Ap.* 453 *of* 1885 (6) followed.

*Purna Chandra Roy* v. *Abhaya Chundra Roy* (7) and *Nadir Hossein* v. *Pearoo Thovildarinee* (8) dissented from.

The mortgage decree having become inoperative, the plaintiff *A*, though a purchaser *pendente lite*, was no longer bound by it, and the defendant therefore was not entitled to enforce the mortgage as against him.

(1) L. R. 8 I. A., 65; I. L. R., 7 Calc., 107.
(2) 14 Moore's I. A., 101; 8 B. L. R., 122.
(3) I. L. R., 14 Calc., 401.
(4) 5 C. L. R., 253.
(5) I. L. R., 9 Calc., 633; 12 C. L. R., 145.
(6) Unreported.
(7) 4 B. L. R., App. 40.
(8) 14 B. L. R., 425.

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*Appeal* 103.—In this case Hem Chunder Chowdhry, the plaintiff, claimed through Kali Chunder Chowdhry, the purchaser at a sale in execution of a decree against Kashi Chunder Bhaduri, defendant No. 3. The defendants Nos. 2 and 3, Juggut Chunder Bhaduri and Kashi Chunder Bhaduri, were brothers, and together with another brother, Mohesh Chunder Bhaduri, not a party to the suit, and defendant No. 4, the widow of another brother, formed a joint family, and Mohesh Chunder acted as their ammooktear or general agent. The Bhaduris owned, among other landed properties, two mehals, called, respectively, Olipore and Ekdhala. On the 25th September 1871, one Kripamoyee Debia obtained a money decree against Kashi Chunder Bhaduri, defendant No. 3, in execution of which the mehal Olipore was put up for sale on the 21st June 1875, and purchased for Rs. 10,000, by Kali Chunder Chowdhry, the father of the plaintiff, who, on 26th September 1877, obtained possession of the property through the Court.

This purchase was made in the course of a suit in which, on the 30th July 1875, one Manson obtained a decree against the Bhaduris on a mortgage which included the mehals Olipore and Ekdhala. This mortgage decree was in course of execution when Manson died and his estate came into the hands of the Administrator-General, who, on 13th August 1878 (corresponding to the 29th Srabun 1285), sold the decree to Gour Sundar Lahiri, defendant No. 1, who was the brother-in-law of the defendants Nos. 2 to 4 and of Mohesh Chunder Bhaduri. After this sale several applications were made to execute the decree and for substitution of the name of the assignee, Gour Sundar Lahiri, for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of the assignee, until 18th July 1885, when, after notice to the judgment-debtor under s. 232 of the Civil Procedure Code, that substitution was made, and execution was taken out against the mortgaged property including the mehal Olipore. The plaintiff claimed that mehal, but his claim was disallowed, and the property ordered to be sold. The plaintiff, therefore, brought this suit to have declared his right to hold that property free of the mortgage.

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*Appeal* 104.—In this case, besides the above facts, it is only necessary to state that the suit related to the mehal Ekdhala which had been purchased by the plaintiff, Hafiz Mahomed Ali Khan, by private sale, from the Bhaduri defendants, and from Mohesh Chunder Bhaduri, under deeds of sale dated 24th Falgoon 1284 (7th March 1878), and 5th Joisto 1285 (18th May 1878). This property had also been attached by Gour Sundar Lahiri under the mortgage decree, and the suit was brought after rejection of the plaintiffs' claim to that property, to have it declared that it was not liable to sale under that decree.

The issues raised, so far as they are material to this report, were to the following effect: Whether or not the suits will lie; whether or not, the mortgage decree sought to be executed was barred by limitation; whether or not the plaintiff in appeal 103 purchased with notice of the mortgage; whether or not the purchase of the mortgage decree by the defendant No. 1 was *benami* for defendants Nos. 2 to 4 and collusive; and whether or not that decree bound the plaintiffs.

The Subordinate Judge gave the plaintiff a decree in each suit.

The defendant appealed to the High Court.

Mr. *H. Bell*, Mr. *B. Chuckerbutty* and Baboo *Grija Sunkur Mozumdar* for the appellant.

Mr. *Evans*, Baboo *Srinath Das* and Baboo *Jogesh Chunder Roy* for the respondents.

The cases cited and arguments appear sufficiently in the judgment of the Court (PRINSEP and GHOSE, JJ.) which was as follows:—

These two cases were tried together by the lower Court and also by us in appeal by consent of parties, because in some respects the same facts arise in both of them. In both cases the plaintiffs, as purchasers from mortgagors, seek to avoid the effect of the same mortgage decree as affecting their properties. The plaintiffs in each case hold separate properties; but the main points raised in the cases and the circumstances upon which their titles depend are in some respects similar. The mortgage decree was obtained on the 30th July 1875 by one Manson. While that suit was

pending and before the decree was delivered, the share of one of the three mortgagors in a portion of the mortgaged property was attached in execution of a money decree, and on the 21st July 1875, was, in execution of that decree, sold to Kali Chunder Chowdhry, the father of the plaintiff in appeal No. 103. Possession was given to that purchaser, on the 26th September 1877, through the Court. The plaintiff, in the other case, bought privately some of the mortgaged properties from the three mortgagors and also from Mohesh, another member of the family, after the mortgage decree had been delivered. The positions of the two purchasers are, therefore, different both in respect to the nature of the purchases and the time during which they were made.

On the 13th August 1878 (that is, 29th Srabun 1285), the mortgagee having died and his estate being in the hands of the Administrator-General, the decree was sold by that officer to Gour Sundar Lahiri, defendant No. 1 in both these cases. Whether Gour Sundar Lahiri was the real purchaser or a purchaser representing others is one of the principal points for our decision in these cases. When the mortgage decree was sold, it would seem that it was then under execution. After this sale, several applications were made to execute this decree after substitution of the name of the assignee for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree or any order made for substitution of the name of the assignee. On the 18th July 1885, after notice to the judgment-debtors, the name of Gour Sundar Lahiri was substituted for that of the original decree-holder, and proceedings in execution commenced by attachment of some of the mortgaged properties. Claims were thereupon made by the two plaintiffs in the suits before us, but their objections were disallowed on the 3rd February 1886, the Subordinate Judge holding that the purchases made conferred titles subject to the mortgage, and were, therefore, inadmissible under s. 278, the claimants having only the right to redeem the mortgage by paying the amount due to the mortgagee. The two suits now before us were accordingly brought by these parties, the plaintiffs asking for decrees declaring their right to hold the properties

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purchased by them free of the mortgage for various reasons, which will be presently considered, or for any other relief which the Court might think proper and just.

The Subordinate Judge has given both plaintiffs a decree.

In appeal, it is first contended that the plaintiffs have no right to sue by reason of s. 244 of the Code of Civil Procedure, inasmuch as they were representatives of the original judgment-debtor. The position of the two plaintiffs is entirely different so far as they are affected by the operation of this section. The plaintiff Hem Chunder Chowdhry (in appeal 103) is a purchaser in execution of a money decree against the mortgagors. He is, consequently, not a voluntary purchaser, and, as has been held by their Lordships of the Judicial Committee of the Privy Council, his title is not one of privity with the mortgagors, but in some respects adverse to them. We think, therefore, that he cannot be considered as a representative of the judgment-debtors, mortgagors, within the terms of s. 244. The cases to which we refer are *Dinendronath Sannyal* v. *Raj Coomar Ghose* (1), *Anundmoyee Dossee* v. *Dhonendro Chunder Mookerjee* (2); and we may also refer to the case of *Lalla Prabhulal* v. *Mylne* (3). Mr. Bell, for the appellants, however, contends that, inasmuch as the plaintiffs purchased *pendente lite*, and are therefore bound by the mortgage decree, they are similarly bound, without being formally placed on the record or receiving any notice of the proceedings taken in execution, in all proceedings up to the satisfaction of the decree. He particularly refers to the order of the 18th July 1885, under which the name of the purchaser of the mortgage decree, Gour Sundar Lahiri, was placed on the record under s. 232 as assignee of the decree. It is contended that a notice under s. 232 to the judgment-debtors is binding on a purchaser *pendente lite*, and that, consequently, the order so passed precludes the plaintiff from bringing a suit to contest the validity of that mortgage. It has already been stated why we consider that in appeal No. 103 the plaintiff is not the representative

(1) L. R., 8 I. A., 65; I. L. R., 7 Calc., 107.
(2) 14 Moore's I. A., 101; 8 B. L. R., 122.
(3) I. L. R., 14 Calc., 401.

of the judgment-debtor within the terms of s. 244. In this particular instance, there are, however, other reasons which, in our opinion, prevent us from holding that he as well as the plaintiff in the other case was bound by the terms of that order.

The proceeding in execution then before the Courts cannot, in our opinion, be regarded as a *bonâ fide* proceeding. Gour Sundar Lahiri was, in our opinion, not the real purchaser of the mortgage decree, but was only a name representing others, *viz.*, the judgment-debtors, and possibly Mohesh Bhaduri, their brother. Whether the transaction was one including only the judgment-debtors or also Mohesh Bhaduri is not material for the purposes of deciding this matter. It is sufficient to say, for reasons which will be presently given, that we consider that the purchase by Gour Sundar Lahiri was not a transaction for his own benefit, but for the benefit of the judgment-debtors. In this view, the application of Gour Sundar Lahiri—that his name should be substituted for that of the decree-holder as assignee of the decree under s. 232, and asking the Court to pass an order for such substitution—was a sham. It amounted to the judgment-debtors asking the Court for service of a notice on themselves. If the real position of the parties had been made known to the Subordinate Judge, there can be no doubt that he would have refused to recognize such an assignment or to issue the notice required by s. 232. We, accordingly, hold that the plaintiffs are not precluded in these suits from questioning the validity of the order passed under s. 232.

It now becomes necessary to consider, first, the evidence regarding the character of the purchase made by Gour Sundar Lahiri of the mortgage decree, and next, how far the execution of that decree as against the plaintiff is barred by limitation. The evidence of Gour Sundar himself is most important as showing the nature of his purchase. He is, no doubt, a man of insignificant means, but it is not improbable that he had sufficient money, but not much more than sufficient, to have bought this decree. He is a relation of the judgment-debtors, and admits that he is perfectly ignorant of the nature of his purchase; that he has taken no steps to make himself acquainted with what he purchased; that he delayed several years to take any real steps to reap any

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benefit from his purchase; and, lastly, that even now he is not prepared to execute his decree against the mortgagors. He also admits that he has taken very little interest in defending these suits. All these, we are asked to believe, are the acts of one who, even if he could have found means to purchase a mortgage decree, undoubtedly would have left to himself very little other money after such a purchase. We have next the evidence of mookhtears who were consulted in matters connected with this purchase and with proceedings taken in execution of the decree after the purchase. The principal person employed, Janoki Nath Bose, distinctly declares that he never acted for or was consulted by Gour Sundar Lahiri; that the persons with whom he was in communication throughout were the mortgagors or some one of them, or Mohesh, their brother, acting on their behalf. There has been much argument addressed to us regarding the order of the Subordinate Judge, admitting, as evidence in this case, certain letters purporting to have been written by Mohesh Bhaduri to this witness. Independently of those letters, we think there is ample evidence to show that Gour Sundar Lahiri was not the actual purchaser of the mortgage decree, and that the Bhaduris, either the mortgagors or the mortgagors with Mohesh, their brother, were the actual purchasers and were the only persons interested in the purchase. There is also evidence, independently of these letters, to show that Mohesh, a member of the family of the mortgagors, has acted on behalf of the other members, the mortgagors, in all these transactions. Upon this ground we think that the letters would be admissible as evidence. But independently of the evidence of these letters, as has been already stated, there is ample evidence on the record to show that Mohesh acted on behalf of the mortgagors, and that Gour Sundar was in no way concerned in the purchase except in regard to the use of his name in the proceedings in execution. For these reasons we hold that the purchase by Gour Sundar Lahiri was a matter of fact a *benami* purchase. That being so, the applications made in his name, in August and December 1880, were not applications made in accordance with the law within the terms of Art. 179, Sch. II of the Limitation Act of 1877. We follow the opinion expressed in regard to this section by

the learned Judges in the cases of *Abdul Kureem* v. *Chukhun* (1), and *Denonath Chuckerbutty* v. *Lallit Coomar Gangapadhya* (2), and also in an unreported case (Mis. App. 453 of 1885) decided by Wilson and Porter, JJ., on the 20th April 1885. We have been referred to two cases of an earlier date—*Purna Chundra Roy* v. *Abhoya Chundra Roy* (3) and *Nadir Hossein* v. *Pearoo Thovildarinee* (4) in which a contrary opinion was expressed. But we prefer to follow the rule more recently laid down by two Benches of this Court, which is in accordance with the opinion which we ourselves entertain. We, accordingly, hold that a *benami* purchaser is not competent to make an application under s. 232, and that, consequently, the applications made in August and December 1880 were not applications under the Code of Civil Procedure in accordance with law, so as to prevent the operation of the ordinary law of limitation. It is admitted that had it not been for these applications, the subsequent application for execution in 1885 would have been barred. The result, therefore, is that in respect of appeal No. 103, although the plaintiff bought in execution of a money decree *pendente lite*, while proceedings under the mortgage were being taken, and he is, therefore, bound by the decree subsequently passed, that decree has become inoperative by reason of the law of limitation, and therefore the defendant is not entitled to enforce the mortgage as against the plaintiff. The plaintiff will, consequently, receive a declaratory decree to that effect.

The other case stands on different grounds. The plaintiff purchased from the three mortgagors and Mohesh one of the properties previously mortgaged as mentioned in Sch. II of the mortgage decree, after that decree had been delivered. The conveyances are dated 12th March and 18th May 1878. He also advanced Rs. 10,000, on the 13th June of the same year, to the same four persons upon mortgage of another property comprised in that decree. He is, therefore, not only bound by the mortgage decree, but, by reason of his having purchased privately from the mortgagors, must be regarded as in privity

(1) 5 C. L. R., 253.
(2) I. L. R., 9 Calc., 633 ; 12 C. L. R., 145.
(3) 4 B. L. R., App., 40.
(4) 14 B. L. R., 415.

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with them, and as their representative within the terms of s. 244. He would clearly not be entitled to bring a separate suit, such as he has now done, were there not circumstances in his case which, in our opinion, establish fraud so as to entitle him to relief, and place the case beyond the operation of s. 244.

[Their Lordships then went into the circumstances alluded to, which are not material to this report, and concluded]:—

We agree, therefore, with the Subordinate Judge that the plaintiff is entitled to a decree declaring that the mortgage decree cannot be executed in respect to Ekdhala which has been purchased by him.

The appeals will, therefore, be both dismissed with costs.

J. V. W. *Appeals dismissed.*

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*Before Mr. Justice Prinsep and Mr. Justice Banerjee.*

1889 *February* 4.

HARI GOBIND ADHIKARI (PLAINTIFF) *v.* AKHOY KUMAR MOZUMDAR AND OTHERS, MINORS, BY THEIR MOTHER AND GUARDIAN CHANDRATARA, AND OTHERS (SOME OF THE DEFENDANTS).*

*Parties—Right of suit—Benamidar—Suit for declaration of title to, and for possession of, immoveable property—Disclaimer of real owner.*

In a suit for a declaration of the plaintiff's right by purchase to, and for possession of, certain immoveable property, it was found on the evidence that the plaintiff was merely a *benamidar* for one of the defendants, and had no right to the property. That defendant in his evidence disclaimed any title to the property: *Held*, that the plaintiff had no right to sue, being a mere *benamidar*, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, was sufficient to enable the plaintiff to maintain the suit when instituted, or to entitle him to have the real owner added as a co-plaintiff.

*Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (1) followed.

THE plaintiff in this case sued to obtain possession of a piece of land, and certain houses, orchards and tanks appertaining to it, to which he alleged he had acquired a title by purchase from one Radha Kanto Bhowmik, defendant No. 13.

* Appeal from Appellate Decree, No. 73 of 1888, against the decree of D. Cameron, Esq., Judge of Tipperah, dated the 23rd of August 1887, affirming the decree of Baboo Nil Madhub Bandopadhya, Subordinate Judge of Tipperah, dated the 24th of July 1886.

(1) 3 W. R., 159.

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The property in suit in 1853 formed part of a revenue-paying estate belonging to one Kristo Churn Mozumdar. That estate was sold for arrears of revenue, and the purchaser granted to Kristo Churn a permanent lease of the portion in dispute, which he held as his *khanabari*. Subsequently, in 1863, Kristo Churn went to live in another district, leaving one Brindabun Mozumdar in charge of the *khanabari*.

The plaintiff's case was that the property was sold in 1877 by Kali Komal Mozumdar, the son of Kristo Churn, to Radha Kanto Bhowmik, who, in his turn, sold it to the plaintiff in 1883, and that the defendants opposed him in obtaining possession of his purchase. According to the defendants Nos. 1 and 2, the property became the ryoti-holding of Brindabun Mozumdar from whom they acquired it under a bill of sale in 1873, and they had since been in possession of it. The defendant No. 11 disclaimed having any interest in, or title to, the property.

The suit was dismissed in the first Court on the ground that the purchases, by both Radha Kanto Bhowmik and by the plaintiff, were *benami* transactions, and that the suit was therefore not maintainable. That Court found that Radha Kanto's purchase was *benami* for his employers Shib Chunder Aich and his brother, and that the plaintiff's purchase was *benami* for Dinobundhu Nundi, defendant No. 11.

An appeal by the plaintiff was dismissed by the Judge, who agreed in the view taken by the first Court.

The plaintiff appealed to the High Court on the ground (among others) that the finding that his purchase was *benami* for the defendant No. 11, was not sufficient to disentitle him from maintaining the suit, the alleged *benamidar* being a party defendant, and having deposed to the effect that he has no interest in the property in dispute.

Baboo *Hari Mohun Chukrabati* for the appellant.

Baboo *Baikant Nath Das* for the respondents.

The cases cited and arguments sufficiently appear in the judgment of the Court (PRINSEP and BANERJEE, JJ.) which was delivered by

BANERJEE, J.—This is an appeal by the plaintiff against the udgment of the lower Appellate Court, affirming that of the Court

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of first instance, which dismissed the plaintiff's suit upon the ground that he had no right to maintain it, he being merely a *benamidar* for the real owner, defendant No. 11.

The objection urged in second appeal is that as defendant No. 11 is a party to this suit, and has disclaimed all interest in the subject-matter thereof, the defect in the framing of the suit and in the plaintiff's title is thereby cured. It is also contended upon the authority of the case of *Sitanath Shah* v. *Nobin Chunder Roy* (1) that the Courts below ought, if necessary, to have made the defendant No. 11 a co-plaintiff with the appellant.

We do not think that these contentions are sound. The finding arrived at by the Courts below is that the plaintiff has no right to the property in suit, and is merely a *benamidar* for defendant No. 11. That being so, and his prayer in the plaint being for possession upon declaration of his right by purchase in respect of the property in suit, we do not see how the fact of the real owner having been made a defendant in the case can entitle the plaintiff to maintain this suit. Then, as to the real owner's disclaimer in his deposition in this suit, we do not think that that is sufficient to give the plaintiff any right to maintain this suit. Such a right must have come into existence before the date of the institution of this suit. Now, the plaintiff does not allege that either by any bill of sale or by any virtual transfer from the rightful owner, the right to the property in suit has been vested in him. His case from the beginning was that he was the real owner, and that case has been found to be false. A statement by any party to the suit subsequent to the date of its institution cannot give the plaintiff a title. If any authority was needed for such a proposition, we might refer to the observations of the Judicial Committee in the case of *Amirto Lal Bose* v. *Rajonee Kant Mitter* (2).

Then it has been contended that the case cited is sufficient authority in favor of the plaintiff, appellant. We do not think that that is so. That case is distinguishable from the present. That was a case upon a mortgage deed, and was between one of the parties to that deed, and the assignee of the other. It

(1) 5 C. L R., 102. (2) 15 B. L. R., 10 ; 23 W. R., 214.

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does not appear whether in that case the beneficial owner was made a defendant originally ; and this Court, without deciding the question whether the *benamidar* could maintain the suit, simply remanded the case to be decided after making the beneficial owner a co-plaintiff. As pointed out by the Judicial Committee in *Gopeekristo Gossain* v. *Gungapersaud Gossain* (1), a distinction has sometimes been made between suits upon bonds by *benamidars* and suits for recovery of land upon title; and in this latter class of cases, it has always been held that a *benamidar* is not entitled to maintain the suit. To this effect is the authority of the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (2)—a case which is not dissented from but only distinguished by Sir Richard Couch in the late case of *Ram Bhurosee Singh* v. *Bissesser Narain Mohata* (3). And to the same effect is the case of *Fuzeelun Beebee* v. *Omda Beebee* (4). As we are unable to distinguish this case from the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (2), and as the other cases that are cited by the appellant are clearly distinguishable from the present, we must hold as well upon reason as upon authority that the conclusion arrived at by the Courts below is correct. We therefore think that the judgment of the lower Appellate Court ought to be affirmed, and this appeal dismissed with costs.

J. V. W. *Appeal dismissed.*

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*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.*

JOGDAMBA KOER (PLAINTIFF) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

1889 *January* 31.

*Hindu Law, Inheritance—Brother's widow—Survivorship—Benares School of Law.*

According to the law and usage of the Benares School of Hindu Law, a brother's widow has no place in the line of heirs ; nor is she entitled to succeed by right of survivorship.

* Appeal from Original Decree, No. 65 of 1887, against the decree of Baboo Nilmoni Das, Subordinate Judge of Patna, dated the 7th of February 1887.

(1) 6 Moore's I. A., 53, at p. 72.
(2) 3 W. R., 159.
(3) 18 W. R., 454.
(4) 10 W. R., 469 ; 11 B. L. R., 60 note.

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*Bhuganee Daiee* v. *Gopaljee* (1) not followed; *Ananda Bibee* v. *Nownit Lal* (2) followed in principle.

THIS was a suit instituted by one Jogdamba Koer against the Secretary of State for India in Council to recover possession of certain moveable and immoveable properties which originally formed the joint family property of her husband, Ramlall Singh, and his brother Jankisaran Singh, which, on Ramlall's death, became, by the principle of survivorship, the exclusive property of Jankisaran, and passed, on the death of the latter, to his daughter Sahodra, and which, on Sahodra's death, has been taken possession of by the Secretary of State for India in Council on behalf of the Crown under a claim by escheat. The plaintiff alleged that up to the time of Sahodra's death, in April 1884, she was living as a member of the joint family formerly represented by her husband and his brother, and that on Sahodra's death, as the sole surviving member of that family, she became entitled to the properties in suit by survivorship; and further that, as a *gotraja sapinda* of Jankisaran Singh, she was also entitled to the same by the ordinary law of inheritance.

The defendant denied the plaintiff's title, disputed the correctness of the list of the moveables claimed, and alleged that the plaintiff was entitled to maintenance only, and that the same was offered to her, but refused.

The Subordinate Judge dismissed the plaintiff's suit, holding that she was not entitled to take the properties claimed, and that the same had escheated to the Crown.

The plaintiff appealed to the High Court.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Saligram Singh* for the appellant.

The *Senior Government Pleader* (Baboo *Annoda Persád Bannèrjee*) for the respondent.

Mr. *Evans*.—The plaintiff is not excluded entirely from the line of heirs; the rule excluding females is a rule of partial exclusion only, and postpones merely a female's right in favor of males; she would come in after all male relations, cognates or agnates. The

(1) 1 S. D. A., N.-W. P. (1862), 306.
(2) I. L. R., 9 Calc, 315.

following cases show that her exclusion is only partial: *Kutti Ammal* v. *Radhakristna Aiyan* (1) and *Lakshman Ammal* v. *Tiruvengada* (2). The question raised in *Ananda Bibee* v. *Nownit Lal* (3) and in *Jullesur Kooer* v. *Uggur Roy* (4) was one of relative preference and not of total exclusion, and these cases do not, therefore, conclude the matter.

The rule on which total exclusion of females is based is not to be found in the *Mitakshara;* and the doctrine that those only who are named in special texts inherit, is incorrect, as a paternal great-grandmother is entitled to inherit as a *gotraja sapinda* under the *Mitakshara.* A son's widow inherits after the grandmother—See *Balambhatta's Commentaries* on the *Mitakshara.* Widows of *gotraja sapindas* are entitled to inherit—See *West and Bühler's Digest of Hindu Law,* 2nd Edition, pp. 77-78. In *Bhuganee Daiee* v. *Gopljee* (5) the widow of a nearer *gotra sapinda* inherited in preference to a more remote male *gotra sapinda.* The appellant, if not entitled to succeed by right of inheritance, would be entitled to claim the properties by right of survivorship, as she is the last survivor of the family to which the properties belonged. The Hindu Law does not favor escheat, as a "preceptor" and a "pupil" come in between the ordinary heirs and the Crown.

Baboo *Annoda Persad Bannerjee* for the respondent.—Only those females specially mentioned in the texts are entitled to inherit—See *Viramitrodaya, G. C. Sarkar's Translation,* p. 244. The exclusion of females is a total exclusion—See *Mandlick's Vyavahara Mayukha,* pp. 360 361 ; *Sarbadhikari's Tagore Lectures,* p. 440. As to a son's widow inheriting after the grandmother—See *Ananda Bibee* v. *Nownit Lal* (6). Even a grandmother is excluded from the line of heirs–See *Smriti Chandrika,* ch. XI, s. 5, v. 3, 6. In *Strange's Hindu Law,* Vol. I, p. 146, inheritance of females is named as exceptional—See also *Strange's Hindu Law,* pp. 235, 240. A widow of a *gotraja* is not named as an heir in Macnaghten's list—See *Macnaghten's Pr. of Hindu Law,* pp. 33, 34; and it is distinctly affirmed that widows of *gotraja sapindas* are not heirs under the

(1) 8 Mad. H. C., 88.
(2) I. L. R., 5 Mad., 241.
(3) I. L. R., 9 Calc., 315.
(4) I. L. R., 9 Calc., 725.
(5) 1 S. D. A., N.-W. P. (1862), 306
(6) I. L. R., 9 Calc., 315.

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Benares School—See *Mandlick's Vyavahara Mayukha*, pp. 357, 377; *Sarbadhikari's Tagore Lectures*, pp. 665, 673. As to the case law on the subject, the case of *Lallubhai Bapubhai* v. *Cassibai* (1) shows that in Bengal and Madras women are incapable of inheriting unless named by special texts. *Soodeso* v. *Bisheshur Singh* (2) lays down that a brother's widow is not in the line of heirs—See also *Dibraj Koonwar* v. *Sooltan Koonwar* (3). Under the Benares School none but female expressly mentioned can inherit—See *Gauri Sahai* v. *Itukho* (4); *Jogat Narain* v. *Sheo Das* (5); *Ananda Bibee* v. *Nownit Lal* (6); and *Jullessur Kooer* v. *Uggur Roy* (7). The case of *Kutti Ammal* v. *Radhakristna Aiyan* (8) is based upon a mistake in *Colebrooke's Translation of the Mitakshara;* and the decision of *Lakshman Ammal* v. *Tiruvengada* (9) is obiter as to the claim of the sister's sons. The right of inheritance of females entering the *gotra* by marriage, and acquired *sapindaship* through their husbands, is denied in *Mari* v. *Chinammal* (10). As to the widow's claim to succeed by survivorship—See *Ananda Bibee* v. *Nownit Lal* (11).

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.), after stating the facts, as set out above, proceeded as follows :—

The plaintiff (appellant) contends that she is entitled to the properties in dispute as well by inheritance as by right of survivorship, and that, consequently, there can be no escheat. We shall consider these two grounds of the plaintiff's claim separately.

Upon the question of the plaintiff's title by inheritance, the learned Counsel for the appellant conceded (and, we think, very properly conceded) that in the face of the decisions of this Court in the cases of *Ananda Bibee* v. *Nownit Lall* (6) and *Jullessur Kooer* v. *Uggur Roy* (7), he could not contend for the broad proposition that the plaintiff, as the widow of a *gotraja sapinda* of Jankisaran, was entitled to a place in the order of succession

(1) I. L. R., 5 Bom., 110.
(2) 2 S. D. A., N.-W.P. (1864), 375.
(3) 1 S. D. A., N.-W. P. (1862), 240.
(4) I. L. R., 3 All., 45.
(5) I. L. R., 5 All., 311.
(6) I. L. R., 9 Calc., 315.
(7) I. L. R., 9 Calc., 725.
(8) 8 Mad. H. C., 88.
(9) I. L. R., 5 Mad., 241.
(10) I. L. R., 8 Mad., 107.
(11) I. L. R., 9 Calc., 315.

immediately after her husband. What he contended for was that, though the plaintiff may not have such a high place, she was not excluded from the line of heirs altogether; that the rule excluding females from succession was a rule of partial and not total exclusion, and merely postponed their rights in favor of males; that the proper position of the plaintiff was one after all male relations, whether agnates or cognates; and that the two decisions of this Court, referred to above, did not conclude the present question, as they had only to determine whether certain female relatives were entitled to succeed in preference to the male relatives who opposed them. And in support of the theory of partial exclusion or postponement of claims of female relatives, we were referred to two Madras cases: *Kutti Ammal* v. *Radhakristna Aiyan* (1) and *Lakshman Ammal* v. *Tiruvengada* (2).

Now though the grounds upon which the two decisions of this Court, above referred to, are based, leave no room for the appellant's contention, yet, as the immediate question for decision was one of relative preference, and not of absolute exclusion of certain female heirs, those decisions cannot be held to conclude the present contention.

That being so, and there being the two Madras decisions in favor of that contention, it becomes necessary to examine the authorities bearing on the question now before us.

We shall consider these authorities under three heads: *first*, the original authorities; *second*, the opinions of later writers on Hindu Law; and, *third*, the decisions of Courts of Justice.

Under the first head, if it were necessary to refer to the remoter sources of the Hindu Law, we should find ample authority for the total exclusion of women from inheritance. There is the well-known text of the *Taittiriya Yajur Veda Sanhita* (*Kanda VI, Prapathaka V, and Anuvaka VIII*): "Therefore females are feeble and unworthy of inheritance." Then there is a passage of the *Nirukta* (*Vedic Glossary*) to this effect: "Therefore it is known that a male is the taker of wealth, and that a female is not a taker of wealth"—(see *Roth's Edition of Yaska*, p. 53 and

(1) 8 Mad. H. C., 88. (2) I. L. R., 5 Mad., 241.

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*Satyavrata, Samasrami's Edition*, Vol. II, p. 259) ; and there is the *Sutra or Aphorism of Baudhayana* (*Prasna II, Kanda II*, 27) : " Nor (ought she) to inherit. For the Veda (says) " women are not considered to have a right to use sacred texts, nor to take the inheritance," which forms the basis of the law on the point. Nor is this exclusion of females a feature peculiar to Hindu Law. The exigencies of primitive society stamped that feature more or less upon ancient law everywhere. In the present instance the text itself contains the reason for the rule it lays down. It says women are feeble, and, therefore, unworthy of inheritance. But we need not go behind works like the *Mitakshara* and the *Viramitrodaya* ; our duty being, as the Judicial Committee point out in the case of the *Collector of Madura* v. *Moottoo Ramlinga Sathupathy* (1), not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which we have to deal, and has there been sanctioned by usage. We shall, accordingly, confine our attention to the consideration of the *Mitakshara*, the *Viramitrodaya*, the *Vaijayanti*, and the *Commentaries* on the *Mitakshara* by *Viseswara* and *Balambhatta*, these being the leading authorities at the present day of the Benares School of Law, which is the law governing this case ; and we shall incidentally consider the *Vyavahara Mayukha*, the *Smriti Chandrika* and the *Dayabhaga* and the *Vivada Chintamani*, which supplement the *Mitakshara* in the Maharastra, the Dravida and the Mithila School.

The *Mitakshara* lends no direct support to the appellant's contention. It divides the remoter heirs after the brother's son into three classes (ch. II, s. 1, v. 2, 3) : (1) the *gotrajas* (gentiles) ; (2), the *bandhus* (cognates) ; (3), certain specified strangers, *viz.* the preceptor, the pupil, and the fellow-student in the Vedas ; these classes come in the order in which they are named above ; and, in default of all these, the King takes the property, except in the case of Brahmans (an exception which does not hold good in British India—See *The Collector of Masulipatam* v. *Cavaly*,

(1) 12 Moore's I. A., 397.

*Vencata Narrainapah*) (1). Now the only class under which the appellant can come, is the first, she being a *gotraja* of her husband's brother in this sense. that she has by her marriage become of the same *gotra* as her husband and his brother; and she is also a *sapinda* of her brother-in-law according to the meaning assigned to that term in the *Mitakshara* (see the *Commentary* on *Yajnavalkya*, I, 52). But neither the brother's widow, nor the widow of any other collateral agnate, is mentioned as an heir. It might be contended that the text of *Baudhayana* cited above, upon which the exclusion of females is based (see *Viramitrodaya*, *G. C. Sirkar's Translation*, p. 198), is not referred to in the *Mitakshara*, and that the doctrine that only those female relatives are heirs who are named in special texts cannot be true, as the paternal great grandmother, who is not named in any special text, is expressly mentioned as entitled to inherit as a *gotraja sapinda* in the *Mitakshara*. But to this the answer is that *Baudhyana* has been distinctly recognised as an authority by *Vijnaneswara* (see the *Commentary* on *Yajnavalkya*, I, 4, 5), and that though the paternal great grandmother may not be named in any text, yet her case, and that of other female lineal ancestors, closely follow that of the grandmother, and are, upon reason and common sense, very different from that of the widows of collateral agnates. And it is singular that if *Vijnaneswara* meant to include them, he should not have named any one of them as coming in the line of heirs. The preponderance of reason seems to be in favor of the view that the *Mitakshara* is opposed to the appellant's claim. As the Privy Council observed in the case of *Lallubhai Bapubhai* v. *Cassibai* (2), perhaps the most that can be said is that the Mitakshara is not inconsistent with the appellant's claim, if such claim is otherwise made out. One thing, however, is clear: the *Mitakshara* lends no support to the appellant's contention that though, in consequence of texts and decisions adverse to women's heritable rights, the appellant's claim has to be postponed in favor of every male heir, whether a *gotraja* or a *bandhu*, she may yet come in as an heir in default of all male *gotrajas* and

(1) 8 Moore's I. A., 500. (2) I. L. R., 5 Bom., 110.

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*bandhus*. If the appellant can come in as an heir at all under the *Mitakshara*, it must be as a *gotraja sapinda* ; and if, therefore, her claim has to be postponed in favor of a *bandhu*, it must so far as the *Mitakshara* is concerned, be postponed for ever. For it is only upon failure of *gotrajas* that *bandhus* inherit—(*Mitakshara*, ch. II, s. vi, 1).

Turning now to the *Viramitrodaya*, which is a work of high authority in the Benares School, and is followed in matters left doubtful by the *Mitakshara*—see *Gridhari Lall Roy* v. *The Government of Bengal* (1)—we find that the appellant's claim is distinctly negatived there. The author notices an interpretation of the Vedic text cited above, according to which it has nothing to do with inheritance, but he considers that interpretation unsatisfactory, as it contradicts the text of *Baudhayana* "Hence," says he, "it cannot but be held that the text of *Sruti* does prohibit women's right of succession, inasmuch as otherwise the quotation (by *Baudhayana*) of that text as establishing the position would be unreasonable."—(*G. C. Sarkar's Translation*, pp. 198, 199). And in another place, when speaking of succession to woman's property (with reference to which one would have expected the recognition of woman's heritable right to a larger extent) he says: "But the daughter-in-law, and others (of the sex), are entitled to food and raiment only; for the nearness as a *sapinda* is of no force when it is opposed by express texts. Since a text of the *Sruti* declares: 'Therefore women are devoid of the senses and incompetent to inherit; and a text of *Manu* founded upon it, says: 'Indeed the rule is that, devoid of the senses, and incompetent to inherit, women are useless.' 'The conclusion arrived at by the author of the *Smriti Chandrika*, *Haradatta* and other southern commentators, as well as by all the oriental commentators, such as *Jimuta Vahana*, is, that those women only are entitled to inherit whose right of succession has been expressly mentioned in the texts, such as—'the wife and the daughters also, &c.,—but that others are certainly prohibited from taking heritage by the texts of the *Sruti* and *Manu*."—(*G. C. Sarkar's Translation*, p. 244.)

(1) 12 Moore's I. A., 448.

As to this passage, West, J., in *Lallubhai Bapubhai* v. *Mankuvarbai* (1), observes that *Manu* has been misquoted here. But as the Judicial Committee pointed out in the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2), the question is not whether the authority of *Manu* has been misquoted, but whether the *Viramitrodaya* itself is an authority for the Benares School; and, as to this latter question, there can be no room for doubt or discussion. The truth is that commentaries and digests, like the *Mitakshara* and *Viramitrodaya*, owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors, and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression. This appears notably from the discussion in the *Mitakshara* in the section on the nature of property, where popular usage is referred to as one of the strongest points in favor of the author's doctrine, that the son's right in the father's property arises by birth (Ch. I, s. i, 23). Upon the present question, the doctrine stated by *Mitra Misra*, which is supported by the general consensus of opinion of a number of approved commentators named by him, should be accepted as a correct statement of the prevailing law, even though the reasoning in support of the doctrine may be in some respects faulty.

It should be observed that the exclusion of females, that is laid down in the texts of the *Sruti* and of *Baudhayana*, and is affirmed by *Mitra Misra*, is a total exclusion from inheritance, and is not a mere postponement of their claims in favor of male heirs.

*Viseswara* in his commentary on the *Mitakshara*, the *Subodini* (see *Mandlick's Vyavahara Mayukha*, pp. 360, 361), and in the *Madana Parijuta* (see *Sarbadhikari's Tagore Law Lectures*, p. 440) clearly excludes the widows of collateral *gotrajas*, when he does not name them in his detailed list.

The *Vaijayanti* places the widowed daughter-in-law immediately after the widow (a position which is directly opposed to

(1) I. L. R., 2 Bom., 441. (2) 12 Moore's I. A., 397.

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the *Mitakshara* itself), but it does not help the appellant very much, for it does not name the widow of any collateral *gotraja sapinda* in its list of *sagotra sapinda* heirs—(see *Sarbadhikari's Tagore Law Lectures*, p. 478).

*Balambhatta* lends some support to the appellant's claim by assigning to the son's widow a place immediately after the grandmother. But since the decision in *Ananda Bibee* v. *Nownit Lal* (1) that can no longer be considered good law as was conceded in the argument (see *Sarbadhikari's Tagore Lectures*, p. 481).

The *Vyavahara Mayukha* throws very little light upon the present question. West, J., in *Lallubhai Bapubhai* v. *Mankuvarbai* (2) observes: "If the foundation of the rights of widows of *gotrajas* under the *Mitakshara* is slender, under the *Mayukha* it may be called almost shadowy."

The *Smriti Chandrika* is decidedly opposed to the appellant's claim. It rigidly enforces the *Sruti* text, declaring the incompetency of women to inherit, and it excludes even the grandmother from the line of heirs (see Ch. XI, s. v, 3-6).

The *Dayavibhaga*, in discussing the widow's succession, explains the text of *Sruti* cited above in a sense which makes it perfectly harmless as regards the heritable rights of women—(see *Burnell's Translation*, p. 33).

This might lead one to think that the author was in favor of a liberal admission of females into the order of succession. But, when considering the succession of *gotrajas*, he gives us no indication in that direction, and his enumeration of *gotrajas* is almost the same as that in the Mitakshara. The truth seems to be that the author's interpretation of the *Sruti* was only an additional argument in favor of the succession of the widow whose right had come to be generally recognised; but the author was not prepared to carry that argument to its consequences by admitting other females whose rights were not so recognised.

The *Vivada Chintamoni* is wholly silent on the point.

The above examination of the *Mitakshara* and the leading authorities that supplement it in the different schools, shows that

(1) I. L. R., 9 Calc., 315. (2) I. L. R., 2 Bom., 447.

none of them expressly mentions the brother's widow or the widows of *gotraja sapindas* as entitled to succeed; only two of them, the commentary of *Ballambatta* and the *Dayavibhaga* afford any ground in favor of their claim; while two others, the *Viramitrodaya* and the *Smriti Chandrika*, expressly deny their right; and the rest are either silent on the point or imply their exclusion by omitting to mention them in their detailed list of heirs. In this state of things, considering the weight attached to the *Viramitrodaya* in the Benares School, we think, so far as the original works on Hindu Law are concerned, the weight of authority is against the appellant's contention that she is in the line of heirs.

Turning now to the later writers, European and Indian, who have examined the subject, we find that, according to Sir Thomas Strange, the instances in which females are allowed to inherit are deemed as exceptional, 'the general principle being that the sex is incompetent to inherit' (1 *Strange's Hindu Law*, 146). *Sutherland*, speaking of the daughter-in-law, says: "Nor does there exist any supposed case in which she could inherit" (2 *Strange's Hindu Law*, 235); and, in another place, speaking of the niece, he observes: "In the series of heirs the niece is nowhere enumerated, and my Pandit agrees with me that the estate of the deceased would escheat rather than descend to a niece." (2 *Strange's Hindu Law*, 240), *Macnaghten* does not name the widow of any collateral *gotraja sapinda* in his enumeration of heirs (*Principles of Hindu Law* pp. 33, 34), nor does *Shama Charan* in the list given by him in the *Vyavastha Chandrika* (Vol. I, pp. 182, 204); while *Mayne* (*Hindu Law*, para 541)., *Mandlick* (*Vyavahara Mayukha*, pp. 357-377), and *Sarbadhikari* (*Tagore Law Lectures*, pp. 665-673) distinctly affirm that the widows of *gotraja sapindas* are not regarded as heirs under the law of the Benares School. Against this view, however, there is the opinion of *West and Buhler* (*Digest of Hindu Law*, 2nd Ed., pp. 177, 178) that widows of *gotraja sapindas* are entitled to inherit under the *Mitakshara*; but that opinion has reference to the Mitakshara Law of the Bombay Presidency, and not to the law of the Benares School where the *Mitakshara* is supplemented by the *Viramitrodaya*.

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We come next to the most important class of authorities, the decisions of Courts of Justice.

In *Lallubhai Bapubhai* v. *Cassibai* (1), which is the leading case on the point in Bombay, while recognising the heritable rights of female *gotraja sapindas*, the Privy Council base that recognition not upon the *Mitakshara*, but upon the prevailing usage of the Bombay Presidency; and, with reference to the law of the other schools, the judgment of the Judicial Committee contains the following important observation: "According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of *Baudhayana*, which declares that women are devoid of the senses and incompetent to inherit. The same doctrine prevails in Benares; the author of the *Viramitrodaya* yields, though apparently with reluctance, to this text—(Ch. 3, Part 7.)"

In *Soodeso* v. *Bisheshur Singh* (2), the Sadr Court of the North-Western Provinces held that the brother's widow is not in the line of heirs. That is a case distinctly in point. In *Dilraj Koonwar* v. *Sooltan Koonwar* (3), a son's widow was held to be no heir under the *Mitakshara*. The Allahabad High Court in *Gauri Sahai* v. *Rukho* (4) held that none but females expressly named as heirs can inherit under the law of the Benares School, and that the father's sister's sons are entitled to succeed to the exclusion of the paternal uncle's widow, and the learned Judges observed: "We think it, however, unnecessary to discuss the question, so fully argued in the judgment of the Bombay Court, whether the wife of a *gotraja sapinda* is to be held under the *Mitakshara* to be a *gotraja sapinda*? We are of opinion that looking to the *received* interpretation of the law, and the customary law prevalent in this part of India, none but females expressly named as heirs can inherit." And this view of the law is affirmed as correct by a Full Bench of that Court in *Jagat Narain* v. *Sheo Das* (5). Against these decisions there is only one case that can be

(1) I. L. R., 5 Bom., 110. (3) S. D. A., N.-W.-P. (1862) 240.
(2) S. D. A., N.-W.-P. (1864) 375. (4) I. L. R., 3 All., 45.
(5) I. L. R., 5 All., 311.

cited on the other side, the case of *Bhuganee Daiee* v. *Gopaljee* (1). In that case the widow of a nearer *gotraja sapinda* was allowed to succeed in preference to a more remote male *gotraja sapinda*. But the decision is based, not upon the right of inheritance, but upon the right by survivorship. The question, whether the plaintiff in this case is entitled to suceed upon this latter right, will be considered presently.

In the case of *Lalla Jatee Lall* v. *Dooranee Kooer* (2), a Full Bench of this Court held that the step-mother is no heir under the *Mitakshara*. In *Ananda Bibee* v. *Nownit Lal* (3), after an elaborate examination of the authorities, Mitter and Maclean, JJ., came to the conclusion that, according to the law and usage of the Benares School, no females, except those expressly named as heirs, can succeed, and they, accordingly, dismissed the claim of the daughter-in-law on the ground that she was not in the line of heirs at all. And in *Jullessur Kooer* v. *Uggur Roy* (4) this Court disallowed the sister's claim to inherit upon the ground that, of female *sapindas*, only those that are specified by name as heirs can inherit according to the Mitakshara Law.

It remains now to notice the Madras decisions. Neither of the two cases cited on behalf of the appellant is in point, as they both relate to the succession of the sister. But they were referred to in support of the argument that, though certain female relations are not entitled to succeed as *gotraja sapindas* or *bandhus* in preference to any male heir, yet they come in as heirs before the estate passes to any stranger; or, in other words, that the rule about exclusion of females is one of partial and not total exclusion, the claims of the excluded females being only postponed in favor of those of males. Now in the earlier of the two cases, that of *Kutti Ammal* v. *Radhakristna Aiyan* (5), the decision in favor of the sister's right is evidently based upon a mistake in *Colebrooke's* translation of the *Mitakshara*. The learned Judges, after citing the case of

(1) 1 S. D. A., N. W.-P. (1862), 306.
(2) W. R., Sp. No., 173.
(3) I. L. R., 9 Calc., 315.
(4) I. L. R., 9 Calc., 725.
(5) 8 Mad. H. C., 88.

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*Gridhari Lal Roy* v. *The Government of Bengal* (1), and quoting the *Mitakshara* (Ch. II, s. vii, para 1,) according to *Colebrooke's* translation, which runs thus: "If there be no relation of the deceased, the preceptor, or, on failure of him, the pupil inherits, by the text of *Apastamba*, 'If there be no male issue, the nearest kinsman inherits, or, in default of kindred, the preceptor"—observe: "It follows from the above not only that in regard to cognates is there no intention expressed in the law or to be inferred from it of limiting the right of inheritance to certain specified relationships of that nature, but that, in regard to other relationships also, there is free admission to the inheritance in the order of succession prescribed by law for the several, classes, and that all relatives, however remote, must be exhausted before the estate can fall to persons who have no connection with the family." These observations would have been perfectly correct if the above passage of the *Mitakshara*, on which they are based, had been a correct translation of the original. But that is not so. The word translated 'relations' is *bandhu*, and that rendered as 'kinsman and kindred' is *sapinda* in the orginal, and these are technical words very much restricted in their signification. There is, therefore, really no authority for the proposition that all relations, however remote, must be exhausted before strangers can claim the estate.

In the second case, that of *Lakshmanammal* v. *Tiruvengada* (2), though in the view that the Court took of the superior claim of the sister's son, it was not at all necessary to decide whether the sister was an heir or not, yet the learned Judges threw out the observation that *Vijnaneswara* recognised the texts excluding females so far as to give priority to males, and that it was not intended absolutely to exclude all but certain excepted females. Now reading the *Mitakshara* and the *Viramitrodaya* together, we must say, with all respect for the learned Judges, that we do not find any ground for limiting the texts exculding women in that way. The texts say 'women are incompetent to inherit,' and we can find no authority for saying that they mean that women are incompetent to inherit only in competition with males.

(1) 12 Moore's I. A., 448. (2) I. L. R., 5 Mad., 241.

In a still later case—*Mari* v. *Channammal* (1)—which is somewhat more in point, and in which a Full Bench of the Madras High Court has held that the step-mother was not entitled to inherit in preference to a paternal uncle, Turner, C.J., in delivering the judgment of the majority of the Court, made the following important observation: "No decision of the Sadr Adalat, the Supreme Court or this Court has been cited, nor has any usage been proved by which a right of succession has been recognised as appertaining to a step-mother or to any of the females who by marriage have entered the *gotra* and acquired *sapindaship* solely through their husband; for these reasons the claim of the step-mother as a *gotraja sapinda* has not been in my judgment established, and the claim of the paternal uncle must be allowed."

Upon a review of the foregoing authorities we come to the conclusion that, according to the law and usage of the Benares School of Hindu Law, which governs this case, the brother's widow is not in the line of heirs at all.

We have now to consider the second ground upon which the appellant puts her case. It is contended that, even if the appellant is not entitled to the properties in suit by right of inheritance she can claim them by right of survivorship as the last surviving member of the family to which the same belonged. No authority was cited in support of this contention, and, perhaps, the only authority that can be cited for the appellant is the case of *Bhuganee Daiee* v. *Gopalajee* (2) already referred to. No authority is referred to in support of that decision except the opinion of the Pandit upon which it is based; and even that opinion is not given *in extenso*. On the other hand, there is the case of *Ananda Bibee* v. *Nownit Lal* (3), which is binding upon us and which is clear authority to the contrary. In that case the same contention was raised in favor of the daughter-in-law, but the Court rejected it and allowed the estate to pass to remote *bandhus*, who were no members of the family, which originally owned it, to the exclusion of the daughter-in-law, Mitter J., observing: "It has been said that she, while her father-in-law Gakul Chand was alive, was

(1) I. L. R., 8 Mad., 107.

(2) 1 S. D. A., N.-W. P. (1862), 306.

(3) I. L. R., 9 Calc., 315.

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living with him as a member of a joint Hindu family, and, therefore, on his death, she is entitled to the property left by him. It seems to me that this contention is wholly untenable. The foundation of the right of survivorship is joint ownership. In this case, it cannot for a moment be contended that the plaintiff had any sort of ownership in the property in dispute during the life-time of her father-in-law." These observations are equally applicable, *mutatis mutandis*, to this case. The following passage of the *Viramitrodaya* may be cited in support of the same view: "Her right is only fictional but not a real one: the wife's right to the husband's property, which, to all appearance, seems to be the same (as the husband's right), like a mixture of milk and water, is suitable to the performance of acts which are to be jointly performed; but it is not mutual like that of brothers, hence it is that there may be separation of brothers, but not of the husband and wife, on this reason is founded the text, *viz.*,—'Partition cannot take place between the husband and wife,' therefore it cannot but be admitted that upon extinction of the husband's right the extinction of the wife's right is necessary—(*G. C. Sarkar's Translation*, p. 165).

It was contended that it would be most unlikely that the Hindu Law, which so jealously guards against escheat as to interpose even strangers, such as the preceptor and the pupil, between the ordinary heirs and the Crown, should favour such hardship as the utter exclusion from inheritance of one whose husband was a joint owner of the estate. Now the recognition of the claims of the preceptor and the pupil is due, we think, not to any jealousy of the Hindu Law to the claim of the Crown, but to a deserved deference to the relation between pupil and preceptor. In the good old days of Hinduism when every twice born man had to live in the house of his preceptor as a member of his family during his studentship extending over a long series of years, that relation was almost as intimate and as sacred as that between father and son. And then as for the hardship of the case, it seems to be more imaginary than real. If, as it must be conceded, the appellant's claim has to be postponed in favor of the remotest *samanodaka* or *bandhu* who would practically be a stranger to her, there is no greater hardship in allowing escheat

to the Crown from whose representatives she can well expect, and we hope will readily obtain, a much more liberal allowance for her maintenance with much less difficulty of realization than she could from a distant relation succeeding to the estate.

Upon all these grounds we think the judgment of the Court below is right and ought to be affirmed with costs.

T. A. P. *Appeal dismissed.*

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# PRIVY COUNCIL.

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KRISTOROMONI DASI (PLAINTIFF) *v.* NARENDRO KRISHNA BAHADUR AND OTHERS (DEFENDANTS).

P. C.*
1888
*November*
6 & 24.

[On appeal from the High Court at Calcutta.]

*Hindu Law, Will—Construction of Will—Successive interests bequeathed—Gift over after life interest—Construction of gift to persons, and the heirs male of their bodies.*

A will cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mullick case*) (1); secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*) (2), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid.

A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

(1) *Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moore's I. A., 123.

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*, L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.